

PORTLAND DIVISION

MICHAEL G. SCHWERN,

Plaintiff,

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$$V.$$

NOÍRÍN PLUNKETT,

April 9, 2014

Defendant.

Portland, Oregon

## ORAL ARGUMENT

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE PAUL PAPAK

UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

## APPEARANCES

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1                               TRANSCRIPT OF PROCEEDINGS

2                   THE COURT:   Good morning, Counsel.

3                   MS. OLSON:   Good morning, Your Honor.

4                   MR. WILNER-NUGENT:   Good morning.

5                   THE COURT:   Sorry for the delay.  We were hoping  
6 to get a court reporter, but I think magistrate judges get  
7 the second bite at the apple and court reporters are up in  
8 Judge Mosman's courtroom, so I thought we would be timely  
9 and get going.

10                  I've had a chance to review the record and all the  
11 briefing, including the declaration filed this morning by  
12 plaintiff, the declaration of Casey West.

13                  Have you received that, Ms. Olson?

14                  MS. OLSON:   I did, Your Honor.  I received it when  
15 I came into the courtroom this morning.

16                  THE COURT:   All right.  I don't need to hear  
17 argument about whether the district court should consider  
18 motions under anti-SLAPP statutes.  I'm pretty well  
19 convinced that the Ninth Circuit has instructed me that we  
20 should, so I'm going to go forward and hear and resolve this  
21 motion.

22                  And the way I propose doing it is since there's a  
23 two-step sort of shifting burden process, I thought,  
24 Ms. Olson, you could begin and talk to me about why it is  
25 you believe the challenged statements fall within one of the

1 categories described in the anti-SLAPP statute.

2 And then, Mr. Wilner, you can respond and at the same  
3 time make your argument as to why you think there's a  
4 probability, even if the statements do fit, that the  
5 plaintiff will prevail on his claims.

6 And then, Ms. Olson, you can reply and conclude the  
7 argument.

8 So if that works, let's start with the question of the  
9 statements themselves. We're not dealing with the  
10 statements that were made to law enforcement and authority.  
11 The argument is that there were statements made to third  
12 parties that formed the basis for plaintiff's claims here.

13 MS. OLSON: That's correct, Your Honor. And the  
14 statements to the third parties were made to unidentified  
15 third parties, those who purportedly reported to the social  
16 media websites, and then a statement made to Casey West, and  
17 I think the place to start is with defendant's objections to  
18 the evidence of the -- as it has been submitted.

19 The timely filed evidence was only that in the  
20 declaration of the plaintiff, and that evidence was minimal  
21 at -- minimal in the sense that it only included what  
22 the -- what the plaintiff actually knew firsthand.  
23 Everything -- a lot of it was on information and belief, and  
24 I'm not going to belabor my objections to what he  
25 incorporated by reference to the complaint.

1 I'm going to talk about the declaration of Casey West  
2 filed this morning, as well as whether, even without that  
3 declaration, Casey West's statements are admissible, because  
4 I think that they are the only shot that he has of defeating  
5 this motion.

6 The declaration that Casey West told Mr. Schwern that  
7 the statements had been made is inadmissible hearsay. The  
8 statement that is alleged is attributed to my client is not  
9 hearsay, because it's not offered for the truth, but the  
10 statement that she told Casey West is offered for its truth.  
11 It's offered from the perspective of Casey West saying "she  
12 told me this," and the declaration that Mr. Schwern filed  
13 that says, "Casey West told me that Ms. Plunkett told him --  
14 or her -- the following," that is hearsay, because it's  
15 offered for the truth and --

16 THE COURT: Wait a second. I'm confused. Are you  
17 talking now about the Casey West declaration filed today?

18 MS. OLSON: I am not. I'm talking about  
19 Mr. Schwern's incorporation of Casey West's statements.

20 THE COURT: His previous. And you -- let's talk  
21 about the Casey West declaration itself.

22 MS. OLSON: Okay.

23 THE COURT: Because obviously it's intended to get  
24 around that problem.

25 MS. OLSON: It is.

1 THE COURT: And your view is because it's filed  
2 this morning it's -- it shouldn't be considered? It's --

3 MS. OLSON: My view is that it's untimely,  
4 and -- and it goes back to the purpose of an anti-SLAPP  
5 motion and why it exists. If a -- a plaintiff does not have  
6 the statements that are alleged to be defamatory in this  
7 context, that is where the statements are arguably within  
8 the protection of the constitutional rights of petition and  
9 free speech, the plaintiff must have those statements when  
10 he files the lawsuit. I mean, that's the purpose of the  
11 anti-SLAPP motion. And allowing piecemeal additions to the  
12 evidentiary record I think prejudices the defendant in this  
13 case, and it also defeats the purpose of the anti-SLAPP  
14 motion.

15 THE COURT: Let me ask you about that. It seems  
16 to me, arguably, at least, that the plaintiff has what he  
17 alleges are the defamatory statements. Those are the ones  
18 published on the websites, et cetera, not directly by the  
19 defendant, but that it -- it's what we don't have, or didn't  
20 have perhaps until now, was any clear connection, stronger  
21 inference, between the statements that were published on  
22 the -- on the various Internet sites and those made directly  
23 by Ms. Plunkett. And that's what I understand, in part,  
24 Mr. West's statement is about. This suggests she's telling  
25 third parties about these allegations, which plaintiff

1 claims are untrue and defamatory, and that through whatever  
2 inference you want to lead, they -- they find their way on a  
3 number of websites that impact Mr. -- Mr. Schwern's  
4 reputation and employability, et cetera.

5 And so that's my first comment. And then my second,  
6 sort of, question connected with that is: While I agree  
7 with you that anti-SLAPP statutes are an attempt to stop  
8 frivolous lawsuits that inhibit free speech rights quickly,  
9 the provisions of the statute include language that say on  
10 motion and good cause shown there may be specific discovery  
11 conducted, notwithstanding the motion, suggesting there may  
12 be cases where good faith allegations are made, and  
13 plaintiff simply needs some time to do a bit of discovery to  
14 see if -- if -- if there's enough there to make a  
15 meritorious claim and move forward, which I think is what  
16 this is all about.

17 It's not clear to me that Ms. Plunkett is saying I  
18 didn't make the statements to third parties. She simply  
19 more argues there's no evidence that I did. And that's kind  
20 of the moving question in all of this is who said what to  
21 whom and what impact does this have in the analysis of these  
22 claims.

23 MS. OLSON: Let me start with the inference that I  
24 think the Court is tempted to draw from the declaration.  
25 The untimely filed declaration of Casey West. That is that

1 somehow that authenticates the statements on the website.

2 If the Court looks at these statements on -- on the  
3 website, the only reference you see to sources are  
4 references to the plaintiff and his attorney. There are no  
5 references to -- attributing those statements to my client,  
6 so I don't think it's a fair inference that Casey West's  
7 declaration does anything with respect to those social media  
8 websites.

9 The only thing Casey West's declaration would do, if  
10 admitted, would be to establish that my client told  
11 him -- told him or her -- I'm not even sure what gender  
12 Casey West is -- that plaintiff had raped her. There  
13 is -- there are timing questions. The early fall of 2013 is  
14 not particularly helpful, but I think it's fair to assume  
15 that this was made after the plaintiff had been arrested.  
16 And if that's the case, then that gives me an argument that  
17 the statement wasn't made in connection with a judicial  
18 proceeding. The proceeding being the presentation of  
19 evidence to a grand jury and/or the inclusion of the  
20 statement in a restraining order proceeding that's pending  
21 in a Massachusetts court.

22 So if the Court reaches the declaration of  
23 Casey West -- and, just to be clear, I do object to the  
24 declaration of Casey West being received -- I think that  
25 it's untimely. But, more than that, there are procedures in



1 place to seek discovery. There are procedures in place to  
2 file late evidence in support of a motion. None of those  
3 procedures have been attempted, and I submit that at this  
4 juncture it's simply too late and, again, defeats the  
5 purpose of this motion.

6 But with respect to the statements of Casey West, if  
7 the Court is going to consider them, the protections of  
8 31.150 don't just include speech that is absolutely  
9 privileged under the First Amendment or the right of  
10 petition. It includes any statement that is identified  
11 within 31.152. And those are statements not just made in a  
12 judicial proceeding, but they are statements made in  
13 connection with a judicial proceeding. And they are also  
14 statements made in public places or places open to the  
15 public about an issue of public interest.

16 And I argued and I'm not going to belabor the argument  
17 that I made in my reply that this subject is an issue of  
18 public interest, at least public interest in the context of  
19 their community, which case law tells us includes cat  
20 breeding communities. If it includes cat breeding  
21 communities, then I submit that it includes open-source  
22 software communities. Whatever what means.

23 So there are at least three different bases on which  
24 the Casey West's statement, if made and if considered, would  
25 be -- would be within the protections of 31.152 (b), (c),

1 and (d). And so I -- you know, with that said, I -- the  
2 other statements -- if the Court is going to consider the  
3 statements on a social media website, those are statements  
4 made in a -- in a place open to the public or a public  
5 forum, if the Court is going to consider the authenticating  
6 the belated declaration of Mr. Wilner-Nugent, and those are  
7 with an issue of public interest, we've already -- I've  
8 already talked about that, and I talk about that at some  
9 issue in my reply memo.

10 So statements on social media, those are statements in  
11 a public forum on an issue of public interest. Statements  
12 of -- made to Mr. -- or Ms. -- West -- statements may well  
13 fall within 2(a)(2). I'm sorry. Yeah, 2 -- 2(b) and also  
14 2(c) and 2(d).

15 And some of the information on the issue of public  
16 interest comes from Mr. Schwern's declaration about, you  
17 know, what his place has been in the -- in the community in  
18 which he and the defendant both work. He claims that he is  
19 an advocate for gender equity and antisexual harassment and,  
20 in that manner, I mean, there's discussions of limited  
21 public figures and that sort of thing. I don't think we  
22 need to get there. I think we just need to look in the  
23 arena in which these statements are made. And I submit to  
24 you that any of the statements that are attributed to people  
25 that are not involved in the criminal justice process fall

1 within the protections of 31.150. It's a -- it's not a high  
2 burden, and I submit that we've met it in this case.

3 THE COURT: Thank you.

4 Mr. Wilner-Nugent, I tend to agree that there's enough  
5 evidence here, under one or more of the categories, to  
6 suggest that the challenged statements here, which fall  
7 within one of the categories of 31.150, but I want to hear  
8 your response to that and then turn to your -- the second  
9 step in the analysis, which is assuming that they do, which  
10 is what I'm inclined to find, whether or not you've met your  
11 burden as establishing a probability to prevail on your  
12 claims. And then we'll go back to Ms. Olson.

13 MR. WILNER-NUGENT: Thank you, Your Honor.  
14 Because Counsel addressed it, I'd like to take up, briefly,  
15 the issue of the timing of the submission of evidence.  
16 There is no rule that I can find in the Federal Rules of  
17 Civil Procedure, this Court's local rules, or the ORS 31.150  
18 series saying anything about the time when evidence must be  
19 submitted.

20 I agree with Counsel that there's a local rule of  
21 ORCP 1 E that talks about when you can submit responses and  
22 replies and strictly when it's late filing of responses and  
23 replies, which is why we have a motion to extend the time  
24 for me to file my response in this case.

25 As -- you know, the issue of evidence, though, is

1 completely different, and I don't think you can conflate a  
2 piece of evidence, a declaration or otherwise, with the  
3 response and reply deadline.

4 The statute clearly says ORS 13 -- 31.150(4) that a  
5 plaintiff can -- can find substantial evidence in the  
6 affidavits and ORCP 1 E says you can use a declaration in  
7 place of an affidavit. In this particular case, although  
8 I'm not saying that this should be dispositive, the issue is  
9 that Mr. West wanted his lawyer to look at his declaration  
10 before he could submit it, and he got it back to me in the  
11 nick of time.

12 But, in any event, that doesn't really matter. The  
13 point is that there is no timeline before the Court takes  
14 the case under advisement for submitting evidence.  
15 Moreover, because the best outcome, under the ORS 31.150  
16 standard -- the best outcome defendant could get today would  
17 be dismissal without prejudice, after which we could refile  
18 the case with the allegedly late submitted declarations and  
19 presumably other evidence included. I think as a matter of  
20 judicial economy, the Court should take both my declaration  
21 and Mr. West's declaration into account when ruling, rather  
22 than have us go through a purposeless refiling.

23 I understand the Court has made up its mind about the  
24 applicability of ORS 31.150 in federal court.

25 THE COURT: I'm inclined.

1 MR. WILNER-NUGENT: Yeah, I know.

2 THE COURT: But I don't know if I've made up my  
3 mind, but --

4 MR. WILNER-NUGENT: I won't make argument on that  
5 point, because the Court's directed me not to, but I will  
6 say that -- I'll just reiterate for the record what I said  
7 in my response memorandum, which is that the Ninth Circuit  
8 didn't take into account 31.155(2) and for the reasons  
9 articulated by Chief Judge Kozinski in his dissent in *Trump*  
10 *University*, I think that if the en banc court would have  
11 taken this issue up, they would have overruled the panel's  
12 previous decisions about allowing anti-SLAPP motions in  
13 federal court. But I'll just rest on that argument.

14 THE COURT: All right.

15 MR. WILNER-NUGENT: Referring to my response to  
16 Counsel's argument regarding whether the law applies in the  
17 first place, this is not the kind of case for which the  
18 SLAPP -- anti-SLAPP laws were written. Both the -- the  
19 Oregon cases say explicitly that Oregon laws were based on  
20 the California laws, because the California laws were really  
21 the first comprehensive anti-SLAPP laws. And the Oregon  
22 laws say look to California case law's instructive, and both  
23 the California and Oregon case law -- and you'll see this in  
24 the Ninth Circuit case that's cited by Counsel -- discussed  
25 the same common body of legislative history, which is that

1 the purpose of anti-SLAPP laws were to prevent people  
2 from -- from organizations, entities, from being able to  
3 squelch any speech about issues of public concern. And the  
4 problem here is that Counsel is bootstrapping a private  
5 issue between two people into an issue of public concern by  
6 indulging in a muddle of generality problem. In other  
7 words, the -- Counsel is attempting to discuss a -- the  
8 generic issue of marital rape or sexual harassment or sexual  
9 assault, call it what you will, the generic social issue  
10 that applies to large numbers of people in a variety of  
11 circumstances and which is inarguably a matter of public  
12 concern and allege that the statements here were about that  
13 issue. But our allegations in our complaint, which I think  
14 at this stage of the lawsuit have to be assumed to be true  
15 for the context of the motion, I think the allegations of  
16 the complaint are that there's private speech that we very  
17 carefully pled. As Counsel said in her original memorandum,  
18 is a carefully drafted complaint. I appreciate the  
19 compliment. We carefully pled it to avoid claims of  
20 qualified privilege or absolute privilege, because we are  
21 not complaining about statements made to police or the  
22 district attorney's office or hospital workers or anything  
23 like that. We're complaining only about statements made to  
24 private parties where there is no privilege that attaches  
25 and those private statements saying not -- not discussing

1 the general issue of public concern and not discussing the  
2 conduct of business by any public body, but, instead,  
3 discussing one person's alleged conduct are not ipso facto  
4 matter of public concern.

5 And so I -- I would argue, actually, respectfully, that  
6 the SLAPP laws don't apply here. But even if they do, I  
7 still rest on my -- that we presented substantial evidence  
8 or that with discovery we could present substantial  
9 evidence.

10 First of all, the Court could take judicial notice of  
11 the OJIN records in the brief -- and the short-lived  
12 criminal case that happened involving Mr. Schwern, if the  
13 Court needed additional evidence on that with regard to the  
14 timing, because Counsel has brought up the timing of  
15 judicial proceedings.

16 Counsel is saying, basically, that anything that is  
17 said that's on the same subject matter as judicial  
18 proceedings between two people is connected with them. I  
19 don't think that the case law set up by Counsel in her -- in  
20 her memoranda even goes that far.

21 But I would note the exhibit that is submitted by  
22 Counsel, which is attached to the declaration of  
23 Ms. Plunkett, which is the restraining order petition, and  
24 that is signed on November 21st, this is Exhibit 1, page 2  
25 of 2. The affidavit, I should say, in support of the

1 restraining order application in Massachusetts.

2       So to the extent Counsel is attempting to use that  
3 judicial proceeding to immunize any of defendant's  
4 statements, I think that comes too late, which I think that  
5 Mr. West's declaration establishes that statements were  
6 being made earlier in the year, 2013, prior to the filing of  
7 that Massachusetts action.

8       I would also -- speaking of the Massachusetts action,  
9 since it was brought up in the reply memorandum, I would  
10 like to address that briefly. I don't think that defendant  
11 can use the Massachusetts action to establish anything of  
12 consequence here, because Counsel is essentially making an  
13 issue preclusion argument. And under -- because we're  
14 proceeding under Oregon law, where ORS 31.150, I think the  
15 choice of law rules would say that Oregon issue preclusion  
16 rules apply.

17       And under issue preclusion, the issues at stake have to  
18 be identical. I don't think we can say that the issues at  
19 stake in the Massachusetts restraining order case and this  
20 case are identical and that -- I'm going to say *Nelson v.*  
21 *Emerald PUD* which is a very well-known Oregon issue  
22 preclusion case, is my best authority for that. I can give  
23 you the full cite if you'd like.

24       In any event, the -- these statements that we're  
25 complaining about were made after Mr. Schwern was released



1 from jail. That is to say he was briefly jailed over one  
2 night and then released. And then by the next Monday, as we  
3 allege in the complaint, he was told that the criminal  
4 charges of strangulation and harassment, the misdemeanor  
5 charges in which he had been jailed the previous week, had  
6 been dropped. There was no additional charging, no  
7 additional case filed in any court after that.

8 And during that period that there was an investigation  
9 of the district attorney's office, which, ultimately, as  
10 we've explained in the complaint, decided not to move  
11 forward, the statements to the district attorney are  
12 privileged, but statements to third parties that have no  
13 ability to affect the outcome of the case whatsoever and  
14 that are made, we allege, with malice there to harm  
15 Mr. Schwern, are not privileged.

16 And so those statements, we believe, can be found in  
17 the declaration of Mr. West, but they can also be inferred  
18 by the conduct to which Mr. Schwern testifies in his  
19 declaration, in which incorporates the allegations of the  
20 complaint.

21 In other words, this is someone who had been a luminary  
22 in his community, who had been at the heart of it, and had  
23 been working on this particular issue of the issue, which is  
24 a very real issue -- the actual issue of public concern,  
25 which is the issue of sexual harassment and assault at

1 high-tech conferences and events.

2 And the -- so our argument is that defendant made  
3 precisely the statements that were best calculated to wound  
4 plaintiff's ability to continue in his career, because they  
5 attacked -- they attacked the special issue of interest that  
6 had made him a star in his field, outside the simple  
7 technical feats that he achieved in his career.

8 Our evidence in support of this argument that I'm  
9 making is contained in Mr. Schwern's declaration. I have  
10 responses to some of the -- Counsel and I have an email  
11 exchange, which I think could easily explain some of it to  
12 the Court regarding some of Counsel's objections to the  
13 evidence contained in my declaration. And I think a lot of  
14 the -- a lot of the matter that Counsel alleges is hearsay  
15 or speculative could be stricken just for purposes of this  
16 motion in the complaint, and the complaint would still  
17 survive based on inferences that can be drawn from the  
18 timing of the republication of the defamatory statements and  
19 from Mr. West's declaration, which I think is a very key  
20 piece of evidence.

21 THE COURT: Well, give me that -- what I'd like to  
22 just hear from you quickly, Mr. Wilner-Nugent, is the -- is  
23 the inferential chain that you would proffer in this case.  
24 You have statements made on public websites. Presuming for  
25 purposes of the argument that I find them to be covered by

1 anti-SLAPP statutes if initially made by the defendant to  
2 the people who republish them, you are -- some of them are  
3 defamatory, per se, they violate other issues that address  
4 your claims. But what's the inferential chain that lead  
5 those back to the defendant? I mean, that's -- there's  
6 no -- except for the statement to Mr. West, it -- assuming  
7 we consider that, there's no other direct evidence of  
8 Ms. Plunkett speaking to any of these third-party sources.  
9 And they certainly don't give attribution to her in any of  
10 their reports. So it -- tell me how there's enough to find  
11 that you have a probability of success here.

12 MR. WILNER-NUGENT: Other than Ms. West --  
13 Mr. West's declaration, which I submit is all by itself  
14 enough connected with the other supporting allegations in  
15 the complaint, I would argue that Mr. Schwern testified that  
16 friends have stopped speaking with him after Ms. Plunkett  
17 moved to Boston. That's paragraph 21 of the complaint. I  
18 think that the timing of that demonstrates that this friend  
19 learned something from Ms. Plunkett that we believe is  
20 false.

21 Regarding the allegations about the organizations --  
22 the Ada Initiative, Geek Feminism, and the Stumptown  
23 Syndicate -- Mr. Schwern is certainly competent to testify  
24 based on his long involvement with each of these  
25 organizations about the background allegations, portraying

1 to why the organizations are important, and the -- the  
2 allegations, the publications contained in the exhibit says  
3 that Mr. Schwern injured a community member, and it says  
4 that the Ada Initiative declines now and in the future to  
5 work with Michael Schwern, and the -- between the parties'  
6 connections to the Ada Initiative, which are alleged in the  
7 complaint and the timing of the publication of this kind of  
8 severe social shunning, the sending him to coventry in his  
9 community, I would argue that we made an inferential chain  
10 that can be established.

11 And to the extent that we haven't, I would argue that  
12 limited discovery could permit us to do so, because we could  
13 subpoena each of these republishers. And I have subpoenas  
14 ready, and I could file them, because if -- if the motion is  
15 dismissed, that's what I'm going to -- is denied, so that's  
16 what I'm going to do, as well. We can subpoena the  
17 republishers and ask them to produce their communications  
18 from Ms. Plunkett and their communications about  
19 Mr. Schwern.

20 Additionally, of course, we could, and I would like to  
21 take the deposition of Ms. Plunkett, and that's -- and I  
22 would like to make a request for production directed to  
23 Ms. Plunkett for her emails and her instant messages and her  
24 text messages with regard to Mr. Schwern.

25 THE COURT: So just so I'm clear, the statute

1 31.152(2) says that the Court on motion and for good cause  
2 shown may order specified and limited discovery in  
3 anti-SLAPP cases.

4 I didn't see in your briefing a request for a motion of  
5 that sort. Are you making that motion now or are you -- are  
6 you saying we should win on the record, but, if we don't,  
7 give me a chance for discovery, so I can do it again? Or I  
8 should win on this record, and if I don't, I'm going to --  
9 I'm going to file again, since it's not a dismissal with  
10 prejudice, and then I'll move for discovery? Just so  
11 I'm -- I make sure I understand the context in which I'm  
12 dealing with your argument here.

13 MR. WILNER-NUGENT: Thank you, Your Honor. I did  
14 make that request in our response at the bottom of page 4  
15 and top of page 5 and then again in the conclusion on  
16 page 11. Oh, no, I'm sorry. I didn't make it separately in  
17 the conclusion. I just said resolve in the state of  
18 discovery.

19 But right above the conclusion, on page 11, the Court  
20 should deny the special motion to strike outright or, at the  
21 very least, should permit plaintiff to seek third-party  
22 discovery augmented as evidence. I guess I would expand  
23 that request to say I'd also like to take the deposition of  
24 Ms. Plunkett and ask her to produce the communications she  
25 had made in writing about Mr. Schwern. They're not

1 privileged.

2 But, Your Honor, I -- I certainly would reiterate that  
3 request, which I made in my response on March 20th, if --  
4 if, and only if, the Court is otherwise going to deny it and  
5 willing to grant plaintiff's motion -- defendant's motion,  
6 I'm sorry.

7 Any other questions the Court has for me, I'll be happy  
8 to answer.

9 THE COURT: Thank you.

10 Ms. Olson?

11 MS. OLSON: Your Honor, that -- that sort of  
12 discovery is exactly what the anti-SLAPP statute is intended  
13 to prevent. It -- back to the Casey West inferences that  
14 you can draw from that, there's no inference that can be  
15 drawn that Casey West is associated with the open-source  
16 community, and therefore a source of any -- I -- I just -- I  
17 submit there's no inferences that can be drawn, other than  
18 that if the Court considers his order of declaration that my  
19 client said something about the sexual assault to him on  
20 her.

21 There was discussion by Mr. Wilner-Nugent about this  
22 being an issue of public concern. I -- or, I'm sorry. I  
23 can't remember his phrase, but I took issue with it, because  
24 the issue is one of public interest.

25 THE COURT: I think he was drawing a distinction

1 between the general discussion of assault in the workplace,  
2 sexual harassment, et cetera, and a specific incident  
3 which -- which he termed a private incident that -- that he  
4 assaulted me and that doesn't -- that doesn't address in the  
5 same generality the public concern. It's much more of a  
6 private interest, and that's -- that's an argument for  
7 taking it outside of the anti-SLAPP categorical language.

8 MS. OLSON: That's correct.

9 So the issue of public concern would have been, you  
10 know, sexual harassment at open-source conferences.

11 But the law says "issue of public interest," so is  
12 this -- is what happened between the two of them something  
13 that is of interest in their community, the open-source  
14 community, and because of the role in which Mr. Schwern  
15 alleges that they -- or the roles that they played in that  
16 community, I submit that it is an issue of interest in that  
17 community and therefore falls within the provisions.

18 Your Honor, one thing what Mr. Wilner-Nugent didn't get  
19 to was whether or not he's introduced substantial evidence  
20 in support of each of the elements of the claims that he's  
21 brought. And the reason I went through with such detail in  
22 my reply is that in order to survive this motion there has  
23 to be evidence, admissible evidence on every one of the  
24 elements. And that evidence, has to be something that  
25 would -- that presents us -- that supports a prima facie

1 case.

2 Mr. Wilner-Nugent hasn't addressed that at all. I did.  
3 And there are a number of elements that I submit are notably  
4 absent in each of those, and that, for that reason, the  
5 second step is one that Mr. Wilner-Nugent and his client  
6 have not survived.

7 It's back to the original comments about California law  
8 and what the purpose of this -- anti-SLAPP law works. They  
9 were actually all created for land use developers who tried  
10 to squelch the little guys opposing big developments, but  
11 there's no question that their use has evolved and many of  
12 the cases that I've cited are California cases involving  
13 criminal acts. I'm sure this Court is -- is familiar with  
14 the *Northon* case, which is often cited. That arose from a  
15 marital abuse -- an act of marital abuse, so criminal acts  
16 are unquestionably within the -- within the scope of the  
17 coverage of ORS 31.150, and this is, I think, my fifth or  
18 sixth one of these motions that arose from an allegation  
19 against the victim that the victim had defamed or otherwise  
20 committed some sort of tortious act against the defendant by  
21 bringing a criminal complaint against them.

22 So the use of the statute is very appropriate for this  
23 type of context, and, for that reason, we'd ask that you  
24 grant the motion.

25 THE COURT: All right. Thank you. It's



1 interesting. I had not had an anti-SLAPP motion in the  
2 past. I'll take this under advisement. This is -- this is  
3 a ninth and tenth case, so it will be a finding and  
4 recommendation, and I'll address, within my finding and  
5 recommendation, the question about the objection to evidence  
6 generally and to Mr. West's declaration specifically. And,  
7 if necessary, depending on how the ruling comes out, your  
8 request, Mr. Bear Wilner-Nugent for additional discovery and  
9 staying the ruling on this until that discovery is  
10 completed, and I'll try and get your ruling as soon as I  
11 can.

12 Thank you very much.

13 MR. WILNER-NUGENT: Thank you, Your Honor.

14 MS. OLSON: Thank you, Your Honor.

15 THE COURT: We're adjourned.

16 (FTR-recorded hearing concluded.)  
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25

## C E R T I F I C A T E

MICHAEL G. SCHWERN, )  
)  
Plaintiff, ) Case No. 3:14-cv-00146-PK  
)  
v. )  
)  
NOIRIN PLUNKETT, )  
)  
Defendant. ) Portland, Oregon  
)  
\_\_\_\_\_ )

ORAL ARGUMENT

April 9, 2014

I certify, by signing below, that the foregoing is  
a true and correct transcript of the FTR-recorded  
proceedings in the above-entitled cause. A transcript  
without an original signature, conformed signature, or  
digitally signed signature is not certified.

/s/Jill L. Erwin, CSR, RMR, RDR, CRR  
\_\_\_\_\_

Official Transcriber/Court Reporter Date: August 11, 2014